IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.28/2004

1) Shri Antonio Fernandes,
Labourer, and his wife,

2) Smt. Antonio Fernandes,
Both r/o. Matermorod-Moll,
H.No.56, St. Jose de Areal,
Salcete – Goa. ..... Applicants.

V/s.

1) Shri Aleuin Olin Tissot D'Mello,
retired commercial employee,
(new deceased, represented
through his legal heirs, namely
plaintiffs No.1(A) to 1(G)

(A) Mrs. Maria Emma Dulcie D'Mello,

(B) Mr. Alwyn Arthur D'Mello,
and his wife,

(C) Mr. Agnelo Jude D'Mello
and his wife,

(D) Mr. Agnelo Jude D'Mello
and his wife;

(E) Mrs. Sunita V. D'Mello,

(F) Mr. Danny Anthony Mario
P. D'Mello and his wife,

(G) Mrs. Rhea D'Mello,
r/o Miramar, Panaji – Goa,
by their attorney, the plaintiff No.2.

2) Shri Ghanashyam Shirodkar,
r/o. 1/A, Bemvinda Apartments,
Pajifond, Margao, Salcete-Goa. ..... Respondents.

Mr. Shivan Desai, Advocate for the applicants.

Mr. N. N. Sardessai, Advocate for the respondents.

CORAM : P.V. KAKADE, J.

DATE : 18TH AUGUST, 2006.

ORAL JUDGMENT :

Heard learned Counsel for both the parties. The defendants-applicants have filed this revision against the order passed by the Additional Civil Judge, Senior Division, at Margao-Goa rejecting their application under Order 9, Rule 9 of the Code of Civil Procedure on the ground that the plaintiffs had earlier filed a suit which came to be dismissed and in the subsequent suit they did not disclose the factum of former suit between the same parties and the same cause of action, was dismissed under Order 9, Rule 8 of C.P.C. and, therefore, no fresh suit could be filed, but the earlier suit should have been restored under Order 9, Rule 9 of C.P.C. and, therefore, pending suit was barred by the impugned provision.

2. On the other hand, it was the stance taken up by the plaintiffs that the suit was not barred by law as there was fresh cause of action set out in the plaint and the application was nothing but a dilatory tactic and hence, sought dismissal of the application.

3. In the course of hearing, I perused the plaints of both the suits. The plaint of the earlier suit shows that it was averred therein (Reg. Civil Suit No.65/86) that the defendants were trying to put up a structure; whereas the cause of action in the present suit was said to have occurred in September, 1998 on the allegation that the defendants were attempting to put up further wooden fencing around the dwelling house without sanction from the Panchayat or the plaintiffs. Needless to mention that both the causes of action are distinct and separate and, therefore, in my considered view, it would not attract the provisions of Order 9, Rule 9 of C.P.C.

4. Learned Counsel for the applicants sought to put reliance on the ruling of the Apex Court in **Suraj Rattan Thirani and ors. vs. Azamabad Tea Co. Ltd. and ors.** AIR 1965 SC 295. Perusal of the said Judgment of the Apex Court shows that the ratio laid down thereby appears to be that the cause of action is a bundle of facts on the basis of which relief is to be claimed. Further in considering whether the cause of action in the subsequent suit is the same or not, as cause of action in the previous suit, the test to be applied is are the causes of action in two suits in substance – not technically – identical. On perusal of the entire Judgment of the Apex Court, I am satisfied that it is not applicable to the present case, thought there could not be any two opinions regarding the ratio laid down thereby. In the present case before me, in substance, the cause of action cannot be said to be identical. Therefore, I hold that the trial Court Judge has rightly dismissed the application of the defendants.

5. In the result, the revision appears to be devoid of any merit and stands dismissed with no order as to costs. Interim relief, if any, stands vacated.

P.V. KAKADE, J.

ssm.